STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2011
v	No. 295363 Oakland Circuit Court
MICHAEL GREGORY JOHNSON, Defendant-Appellant.	LC No. 2009-225262-FC

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of kidnapping, MCL 750.349, and first-degree criminal sexual conduct, MCL 750.520b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of thirty to sixty years in prison. He now appeals and we affirm.

Defendant first argues that he was denied due process of law by the trial court's allowing jurors to submit questions pursuant to MCR 6.414(E). Long before the Supreme Court adopted this court rule, however, it had recognized the right of jurors, even in criminal cases, to ask questions of witnesses:

> [The trial court] ruled, erroneously, that under no circumstances in criminal matters, could jurors ask questions of the witnesses. We hold this view was error. The practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court. It would appear that in certain circumstances, a juror might have a question which could help unravel otherwise confusing testimony. In such a situation, it would aid the fact-finding process if a juror were permitted to ask such a question. We hold that the questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court. [*People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972).]

Under MCR 6.414(E), it remains within the trial court's discretion to allow jurors to ask questions of witnesses, with additional guidance to ensure that inappropriate questions are not asked:

> The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.

In the case at bar, defendant does not argue either that the trial court abused its discretion in permitting questions or that the questions that were permitted were inappropriate. Rather, defendant argues that the practice of allowing questions at all is inappropriate and that "as a matter of law reform, this practice should stop." This argument, however, must be directed to the Supreme Court because we are bound by its decision in *Heard* which permits the practice.

Next, defendant argues that the trial court improperly admitted hearsay evidence over defendant's objection. The victim resided with her daughter and infant grandchild. On the evening in question, the victim went out with a friend. The friend's twelve-year-old daughter (the declarant of the hearsay statement) stayed at the house babysitting the grandchild. When the victim's daughter returned home from work, she asked the declarant where the victim was. The declarant responded that the victim had been screaming and that defendant had taken the victim from the home. Defendant raised a hearsay objection at trial to the victim's testifying as to the declarant's statement. The trial court admitted the statement as an excited utterance. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998).

To be admissible as an excited utterance, a statement must (1) arise out of a startling event, (2) be made before there is time to contrive and misrepresent, and (3) it must relate to the startling event. *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979); *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). In the case at bar, defendant argues (1) that too much time passed between the event and the statement and (2) that the statement was made in response to a question.

With respect to the time factor, it would appear that approximately three hours passed from the abduction until the statement is made. But as the Court makes clear in *Straight*, the issue is not merely how much time has passed, but "whether the statement was made when the witness was still under the influence of an overwhelming emotional condition." *Id.* at 425. In the case at bar, the witness testified that the declarant was visibly shaken up, crying and trying to say something. The declarant stated that she was sorry and then stated that the victim had been screaming and then the victim took her from the house. We are satisfied that the trial court correctly concluded that the statement was made while the declarant "was still under the influence of an overwhelming emotional condition." *Id*.

With respect to the statement being made in response to a question, while this is relevant, it does not require automatic exclusion. *Id.* at 426 n 6; *People v Petrella*, 124 Mich App 745, 759-760; 336 NW2d 761 (1983). The question here was brief, open-ended and not directly related to the crime. The witness had returned home and asked where her mother was. In context, the witness was expecting to find her mother home and caring for the baby. Instead, she found her mother gone and the declarant at the house. Other than the house's being in an unusual state of disarray, she had no particular reason to believe that anything was wrong, or at least not that anything specific was wrong (such as defendant attacking her mother). Thus, the

inquiry was not to develop evidence of a crime, but merely to ascertain what was happening and in particular where her mother was. This then lead to the statement regarding defendant's taking the witness' mother. In this context, we do not believe that this negates the statement's being an excited utterance.

For the above reasons, we conclude that the trial court did not abuse its discretion in admitting the testimony. Furthermore, to the extent that defendant argues that admission of this testimony constitutes a denial of due process, defendant did not object on this basis in the trial court. Given that defendant's due process argument consists of two rather conclusory sentences, he has not demonstrated the plain error necessary to obtain a reversal under this unpreserved argument. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Finally, defendant argues MCL 768.27b, which permits the admission of certain similar acts evidence, is in conflict with MRE 404(b) and therefore violates the constitutional separation of powers between the judicial and legislative branches. There are two problems with defendant's argument. First, defendant does not develop the argument that the disputed evidence would not have been admissible under MRE 404(b). At best, he makes a passing comment that the evidence would not be admissible under MRE 404(b). But, even assuming that the evidence would only be admissible under the statute and not the court rule, defendant faces a second problem. As defendant acknowledges, this Court rejected this same argument in *People v Schultz*, 278 Mich App 776; 754 NW2d 925 (2008). We are bound by that decision under MCR 7.215(J)(1) and see no reason to create a conflict. See also *People v Watkins*, 277 Mich App 358; 745 NW2d 149 (2007), which analyzed the same question under a related statute, MCL 768.27b.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Karen M. Fort Hood